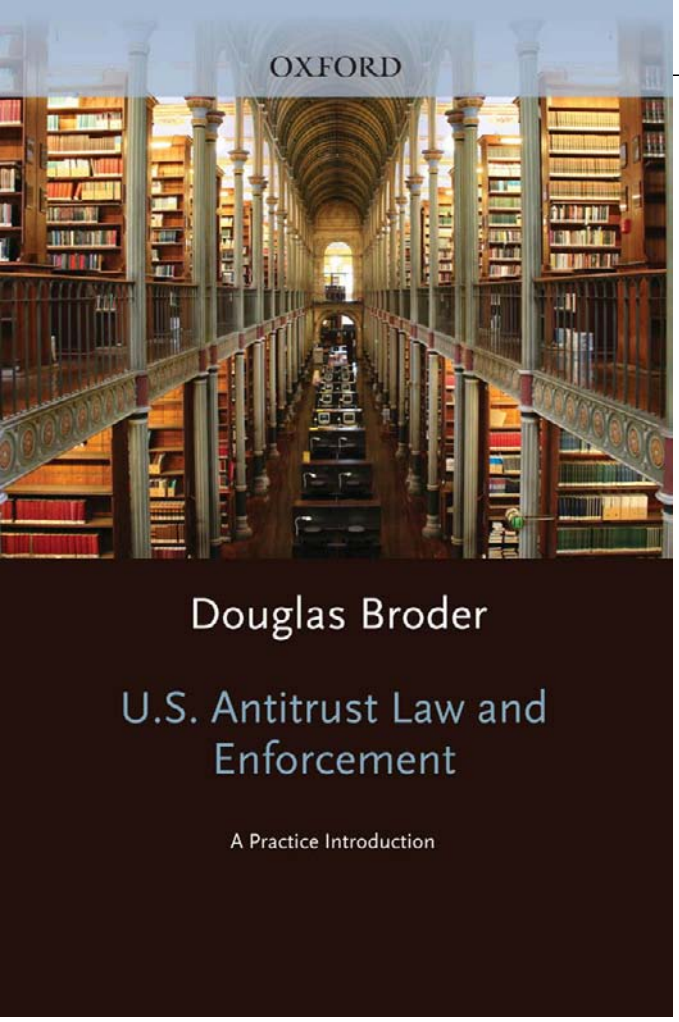
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Douglas Broder
U.S. Antitrust Law and Enforcement
A Practice Introduction

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A Practice Introduction

Douglas Broder

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About the Author

Douglas Broder is the co-chair of the global antitrust practice at K&L Gates LLP. He has been practicing antitrust law and commercial and appellate litigation in New York City since 1977. Mr. Broder is the author of two earlier books on antitrust law and practice as well as of numerous book chapters and articles on antitrust and on written advocacy. For the past twenty years, Mr. Broder has served as the U.S. law reporter for the monthly *European Competition Law Review*.

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Foreword

This is the book I wish I'd been given in 1977. A new law school graduate, I had accepted a job at the Wall Street law firm Lord, Day & Lord. Upon arriving I was told I had the good fortune to be assigned to the legendary Gordon Spivack's antitrust team. The problem was I had no idea what that meant. I had not taken a course on antitrust law and had only a dim awareness that there was such a thing. The only economics I knew came from a one-semester mandatory introductory course I had taken as a modestly motivated college freshman ten years earlier. I had never worked at a law firm and had no idea what law practice at a large corporate firm involved, let alone what went into practicing antitrust law.

I soon discovered to my chagrin that there was no single source to guide me through the maze of statutes and regulations that made up the antitrust laws, nothing to show me where to find them, what they meant, or how they were enforced. And there was nothing to introduce me to the new concepts and strange new uses of words I would encounter—*per se* versus rule of reason, horizontal versus vertical, cross-elasticity of demand, supply-side substitutability, monopsony, *nolo contendere*, and on and on. Nor was there anything to introduce me to how antitrust was practiced.

Most readers will probably not be as clueless as I was. Nonetheless, I thought then, and remain convinced, that there was a need for a one-volume book, written in plain English and readable in a sitting (admittedly a fairly long one), that surveys and categorizes the United States antitrust laws and the cases interpreting them, describes how and by whom these laws are enforced, and introduces the reader to the practice of antitrust law.

This book should be useful to law students; new attorneys who, like I was, are just beginning in antitrust practice; more senior lawyers at firms or in corporate legal departments seeking a refresher or quick introduction; non-U.S. competition law attorneys; journalists; and anyone else seeking an introduction to and overview of U.S. antitrust law, enforcement, and practice.

Chapter 1, "Overview and History of U.S. Antitrust Enforcement," contains an introductory overview of the U.S. antitrust laws and a brief review of the history of U.S. antitrust enforcement. This chapter traces the evolution of antitrust doctrine and enforcement decisions. Chapter 2, "Federal Antitrust Statutes," contains summaries of each of the most important federal antitrust and related statutes. These are the primary sources and the foundation upon which antitrust case law and enforcement are built.

Chapters 3 to 7 contain a narrative discussion of the principles of U.S. antitrust law as contained in the statutes, court decisions, and enforcement guidelines. The chapters are organized according to the primary antitrust statutes. Chapter 3, "Agreements in Restraint of Trade—Sherman Act, Section 1," covers Section 1 of the Sherman Act, which outlaws agreements in restraint of trade (or, as referred to in the European Union, anticompetitive agreements and concerted practices). Chapter 4, "Monopolization and Attempted Monopolization—Sherman Act, Section 2," covers Section 2 of the Sherman Act, which outlaws monopolization and attempted monopolization (abuse of a dominant position). Chapter 5, "Mergers, Acquisitions, and Joint Ventures—Clayton Act, Section 7," covers the section of the Clayton Act which outlaws anticompetitive mergers, acquisitions, and joint ventures (mergers and concentrations). Chapter 6, "Premerger Notification—The Hart-Scott-Rodino Act," covers the Hart-Scott-Rodino Act, which regulates the premerger notification and merger clearance processes (prior notification and clearance). Chapter 7, "Mergers, Acquisitions, and Joint Ventures—Clayton Act, Section 7," covers the Robinson-Patman Act, which outlaws price discrimination.

The narrative contained in these five chapters cites and discusses numerous U.S. Supreme Court decisions. It also cites lower court decisions and secondary sources. But it makes no attempt to provide an exhaustive catalogue of lower federal and state court decisions for research purposes. Nor does it delve in depth into all the fine points and legal and economic intricacies that occupy full-time U.S. antitrust lawyers. Instead, its purpose is to convey an understanding of broad principles, statutory mandates, and statements of the regulatory agencies. At the same time, it should provide a running start for those interested in doing further research.

The book's final chapter, Chapter 8, is called "Antitrust Enforcement." It describes and outlines the activities of the four groups that actually enforce the U.S. antitrust laws: (1) the Antitrust Division of the U.S. Department of Justice; (2) the Federal Trade Commission; (3) the attorneys-general of the fifty individual states of the union; and (4) private civil litigants.

The book also contains an "Appendix" designed to provide context for non-U.S. lawyers and others not familiar with the U.S. federal and legal systems and the judicial decision-making process. The "Appendix" describes those systems, traces the progress of a case through the U.S. federal courts, and explains the system of citation used in this book.

In addition to the traditional index and case and authority tables, the book contains a comprehensive "Glossary" that provides short definitions of common and arcane legal and economic terms and concepts. The glossary is cross-referenced to relevant sections of the main text. Used alone, the glossary provides a quick and easy introduction to, or review of, the often counterintuitive vocabulary of antitrust. Used in combination with the index and tables, the glossary will help jump-start research into unfamiliar areas.

CHAPTER

1

Overview and History of U.S. Antitrust Enforcement

§1.01 Overview

The antitrust laws are the original—and in many ways most important—component of the United States' federal economic regulatory scheme. The antitrust laws seek to protect free markets and vigorous competition by setting limits on the collusive and predatory conduct and monopolistic abuses that free markets often breed. As the United States Supreme Court has put it:

> Antitrust laws in general and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.[1]

The antitrust laws' primary focus is marketplace competition. American antitrust has its roots in the English common-law tort of unfair competition. Indeed, in England and Europe, what America calls antitrust law is commonly referred to as competition law. But modern American antitrust is, at bottom, a creature of statute.

Congress passed the first antitrust law, the Sherman Antitrust Act in 1890 to attack the trusts—oligopolistic cartels that acted collusively rather than competitively—that dominated portions of American commerce during the industrial age. Over the ensuing years, the United States federal government has created a comprehensive series of statutes and regulations aimed at preserving and regulating marketplace competition. These statutes include the Clayton Act (1914), the Federal Trade Commission (FTC) Act (1914), the Robinson-Patman Act (1936), the Cellar-Kefauver Amendments to the Clayton Act (1950), and the Hart-Scott-Rodino Antitrust Improvements (HSR) Act (1976). The states have followed suit by enacting their own antitrust statutes. Most are based on, and some are even stricter than, the Sherman Act and the other federal statutes.

The federal statutes include provisions that outlaw price-fixing, certain tying arrangements, bid-rigging, monopolization, anticompetitive mergers and acquisitions, price discrimination, predatory pricing, and other restraints of trade or unfair methods of competition deemed incompatible with an open and competitive marketplace. To underscore their seriousness, the antitrust laws, have, from the beginning, treated violations as criminal as well as civil offenses. Lengthy prison terms and substantial fines await both individual and corporate violators.

Theoretically, all of the U.S. antitrust laws carry criminal penalties. In practice, however, the U.S. federal antitrust enforcement authorities do not prosecute all antitrust violations as criminal offenses. Instead, they confine

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1. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

criminal prosecutions to hard-core cartel activity, i.e., clear-cut, plainly anticompetitive violations such as price-fixing and bid-rigging.

To further encourage compliance—and to encourage private as well as government enforcement—the antitrust laws permit individuals or companies injured by violations to sue for three times their actual damages (treble damages). And, in a departure from the usual American rule that each party to a litigation is responsible for paying its own court costs and attorneys' fees, the antitrust laws require losing antitrust defendants to pay the plaintiff's court costs and attorneys' fees.

The antitrust laws have spawned a large regulatory and enforcement framework. Two federal agencies, the Department of Justice's (DOJ's) Antitrust Division and the Federal Trade Commission (FTC) are responsible for enforcing of the federal antitrust laws and for creating and implementing of additional rules and regulations. The attorneys general of the fifty individual states enforce their own antitrust laws and can also bring suit on behalf of their constituents under the federal antitrust laws. Private civil plaintiffs, including a group of lawyers who specialize in bringing large antitrust class actions on a contingency fee basis, complete the enforcement apparatus.

The common law—legal principles established not by statute but through court decisions and reliance upon precedent—has also played an important role in developing of antitrust law. The Sherman Act's broad ban on "contracts, combinations and conspiracies in restraint of interstate trade" would, if not narrowed by court interpretation, outlaw every contract or agreement involving commerce that crossed a state boundary within the United States. The other antitrust statutes, though sometimes more specific, also leave ample room for interpretation. Combined with the incentive to litigation provided by treble damages; attorneys fees; and the broad enforcement authority vested in the FTC, the DOJ, and state attorneys general, these statutes have led to the creation of an enormous body of case law interpreting, reinterpreting, and refining the antitrust laws.

Although the basic concepts of antitrust—hostility to monopoly and oligopoly practices and the preservation of competition—have long been clear, the courts' and the regulatory authorities' interpretation of the laws has continuously evolved. Many decisions—even Supreme Court decisions—and statutes once viewed as stating core antitrust principles are now deemed economically and legally unsound, and have either been overruled or are simply ignored.

Certain assumptions underlying the antitrust laws have been widely accepted: Free markets are the most efficient and fairest—or least inefficient and least unfair—form of economic organization; competition on price, terms, service, efficiency, and innovation is indispensable to the proper functioning of a free market; monopoly, oligopoly, and collusion are antithetical to competition; and some form and level of regulation—with both the form and extent of regulation open to debate—is necessary to ensure that the free

markets, and competition, operate fairly and efficiently. As in any competitive enterprise, there must be rules and referees to enforce the rules. There is also, as in any competitive enterprise, constant bickering about the effectiveness of the rules, their meaning, and the fairness of their enforcement.

Antitrust has long been the subject of political controversy in the United States, controversy that has more recently been exported to Europe and, increasingly, the rest of the world. From the passage of the Sherman Act in 1890 to the present, accused monopolists and other subjects of government or private antitrust actions have vilified the antitrust laws or their enforcers as anti-business or as outmoded and lacking relevance to modern business.

The attacks on antitrust have not come only from those on the receiving end of antitrust enforcement and their defenders. A theoretical debate has long raged over what the fundamental goals of the antitrust laws are, what they should be, and how best to achieve them.[2] Issues in the debate include whether big alone is bad; whether the antitrust laws should be enforced vigorously to prevent major accumulations of wealth or productive capacity; whether the antitrust laws should be used to prevent corporations from becoming "too big to fail;" whether monopolies are inherently evil and should be punished or broken up, or whether they are simply evidence of successful business practices; whether monopolies are inherently self-destructive because they have no need to remain competitive and so should be left to the mercy of market forces rather than be the subject of regulatory action; whether antitrust should protect small competitors or simply ensure that consumers get the lowest, most competitive prices and best services; what form antitrust enforcement should take; how many competitors are necessary to guarantee adequate competition in a market; whether there is such a thing as an inherently efficient natural monopoly that should be permitted to exist, and, if so, whether and how it should be regulated; and whether antitrust enforcement is the most efficient means of promoting competition and regulating monopolies, or whether the free market is a more efficient regulator that needs little help except for policing and punishing the most egregious violations of fair competition.

These issues arise from tensions inherent in the free enterprise system. Take monopolies. By definition a monopolist, i.e., one with market dominance, has no, or no effective, competitors. A monopolist thus lacks the spurs provided by competition to low pricing; innovation; and the improvement of productivity, service, and quality. Monopolies also tend to be highly profitable. By definition, a monopolist can price its products with a minimum of concern about competition.

But profits and market dominance are the prizes businessmen play for in free markets. Monopolies can be the product of the rigorous application of those very qualities that antitrust aims to encourage—innovation, efficiency,

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2. *See generally* Robert Bork, *The Antitrust Paradox* (Basic Books 1978).

and low pricing. Thus, one continuing issue is how to retain the incentive of fairly earned monopoly profits, while discouraging, and, when necessary, punishing or otherwise discouraging those who seek or maintain monopolies by unfair or predatory methods or who use monopoly power in one market (however achieved) to obtain similar power in a separate market.

Similarly, there is inherent tension between the antitrust laws, with their hostility to monopoly, and the intellectual property laws, most notably the patent laws. To encourage innovation, the patent laws—and to a lesser degree the copyright and trademark protection laws—award limited monopolies to those who take the trouble and financial risk to create new goods, services, and ideas. The result has been increasingly frequent and important collisions between the antitrust and intellectual property laws.

§1.02 A Brief History of U.S. Antitrust Enforcement

[A] Introduction

One result of the contradictions inherent in antitrust and the evolving political, judicial, social, and academic views of its application and relevance has been what some commentators have likened to a pendulum swing in the amount and nature of antitrust enforcement. In this view, the pendulum has swung from the fervor of the trustbusters at the dawn of the twentieth century to neglect during the Great Depression and World War II. After the war, the pendulum swung slowly back, reaching an extreme in the 1970s with the government structural cases seeking the breakup of IBM and AT&T, only to swing back in reaction to the attacks of the Chicago School of law and economics, whose ideas originated at the University of Chicago, as reflected in the policies of the Reagan and first Bush presidential administrations (1980–1992).

The pendulum swung back toward increased enforcement during the Clinton administration (1992–2000), both as the result of deliberate government policy and in reaction to the unprecedented merger wave that occurred in the last half of the 1990s. Once again, the government was emboldened to take on not just price-fixers—which it prosecuted in record numbers—and those attempting major mergers or acquisitions, but also monopolists, as represented by the government cases against Intel and Microsoft.

George W. Bush's administration (2000–2008) saw the pendulum move back to the right. The administration professed its belief in minimal regulation and free markets, and backed up that position by settling the Microsoft case and cutting back drastically on merger challenges. The DOJ did continue to heavily prosecute international price-fixing cartels—often the result of